THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.11290 of 2005

DATED:16.8.2005

Between:

M/s. Naresh Kumar & Co. a partnership firm

Rep. by its Vice President, having its Office situated at

401 Chenoy Trade Centre, Parklane

Secunderabad

…Petitioner

And

The Superintending Engineer

O&M/CHP/V.T.P.S.

Ibrahimpatnam and others

…Respondents

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.11290 OF 2005

ORDER:

The petitioner assails the letter dt.4.5.2005 addressed by second respondent to the petitioner terminating the contract awarded to him with effect from 20.5.2005. To appreciate the controversy, the facts may be noticed in brief.

A.P.GENCO invited tenders from contractors for awarding work of "supervision of loading, movement of coal, witnessing of weighment, ensuring quality of coal and proper receipt of coal at destination as supplied by M/s.Mahanandi Coalfields Ltd. from Talcher and Ib Valley areas to Vijayawada Thermal Power Station of AP

GENCO" (for brevity, supervision of coal handling). The petitioner submitted tenders and became successful bidder. He was awarded contract by letter of intent (LOI) dt.30.12.2004, which was subsequently clarified by the acceptance letter dt.6.1.2005 and clarification letter dt.10.5.2005. When the petitioner raised objections regarding clauses 3 and 4 in the LOI, the Chief Engineer, second respondent herein, clarified in his letter dt.6.1.2005 to the effect that clause 4 of LOI is not applicable for the first three months. It may also be noted that by letter dt.1.1.2005 the petitioner confirmed the acceptance of all clauses except clauses 3 and 4 of LOI. The petitioner commenced the work in February 2005. The respondents noticed that there was no improvement in shortage minimization quality during first three months and transit losses and UHV (unit heat value) was high. Accordingly, by impugned letter, the contract was terminated. Assailing which, present Writ Petition is filed. When the application moved by respondents for vacating interim order being W.V.M.P.No.1580 of 2005 came up for consideration, this Court heard the matter finally with the consent of the learned counsel for both sides.

Learned counsel for the petitioner contends that clauses 3 and 4 in LOI never form part of the tender schedules or agreement entered into by the petitioner on 24.3.2005 and therefore the respondents cannot enforce either clause 3 or clause 4. Alternatively he would submit that as the respondents agreed not to enforce clause 4 of the LOI for the first three months, it was improper on the part of second respondent to terminate the contract awarded to the petitioner, which is arbitrary and unreasonable. The learned counsel would urge that in view of admitted facts, Writ Petition is not maintainable under Article 226 of the Constitution of India. He relied o n **Ghaziabad Development Authority (GDA) v. General Finance Private Limited, State of Haryana v. Naresh Kumar Bali, State of U.P. v. Bridge & Roof Co. (India) Ltd,** and **Life Insurance Corporation of India v. Asha Goel**.

Learned counsel for AP GENCO, Sri G.Vidyasagar, contends that the dispute, if any, between petitioner and respondents is in relation to a completed contract and therefore Writ Petition is not maintainable. Secondly, he would contend that while accepting LOI by communication dt.1.1.2005 though the petitioner raised objection regarding clauses 3 and 4 of LOI as being beyond the scope of tender specifications, the petitioner did not demur after receiving letter of second respondent dt.6.1.2005 in which it was made clear that clause 4 would not be applicable for the first three months of the contract. According to the learned counsel clauses 3 and 4 of LOI form part of the agreement/contract dt.24.3.2005 between AP GENCO and petitioner. Lastly learned counsel contends that the impugned letter dt.4.5.2005 canceling the contract is referable to clause 3 of LOI and therefore the clog with reference to clause 4 has no application.

The first question that would arise for consideration is maintainability of Writ Petition. There is no denial that the relationship between petitioner and AP GENCO is contractual. The mutual obligations between contracting parties have to be inferred by reference to tender schedule, LOI, letter of acceptance and agreement between parties. The dispute whether AP GENCO can invoke clause 4 of LOI before the expiry of three months is also a dispute in relation to the contract between petitioner and A.P.GENCO, because though the petitioner raised objection in his letter

dt.1.1.2005 for inclusion of clauses 3 and 4 of LOI in the contract, after receiving clarification from second respondent vide letter dt.6.1.2005, petitioner did not raise any objection. Whether the respondents invoked clause 3 or clause 4 is a question of fact and this Court cannot agree with the submission of the learned counsel that the facts of the case are admitted by either side. In this background, whether Writ Petition is maintainable?

In **Kerala State Electricity Board (KSEB) v. Kurien E.Kalathil** the respondent entered into contract with the appellant Board for construction of a dam. A dispute arose regarding payment of revised minimum wages payable to employees in the works. An industrial dispute was raised and Industrial Tribunal held that revised minimum wages notification was not applicable to the works. On coming to the conclusion that the contractor did not pay revised minimum wages, KSEB terminated the contract and ordered recovery of advances for a sum of Rs.3.65 crores whereupon the contractor filed Writ Petition in the High Court. The High Court held that the termination is arbitrary and unjust and further directed the KSEB to pay to the contractor the amounts with interest. Before the Supreme Court, it was *inter alia* contended that Writ Petition is not maintainable. The Supreme Court observed that "contract would not become statutory simply because it is for construction of public utility and it has been awarded by statutory body". The Apex Court further held as under.

> A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.

In **State of U.P. v. Bridge & Roof Co. (India) Ltd.** (supra) the Supreme Court held that when there is effective alternative remedy for settlement of disputes in a contractual matter, ordinarily the Court should not interfere under Article 226 of the of the Constitution of India. In paragraph 21 of the judgment it was held:

> There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing *inter alia* for settlement

> of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy – in this case, provided in the contract itself – is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law, but only to supplement them in certain well-recognized situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 – whether for issuance of mandamus or any other writ, order or direction – was misconceived for the reasons mentioned supra.

In **Life Insurance Corporation of India v. Asha Goel** (supra) the Supreme Court made a distinction between cases filed for mere enforcement of contractual rights and between the cases where not only the enforceability of a contract is involved, but such cases raise important questions of law and constitutional issues for the purpose of adjudication under Article 226 of the Constitution of India. It is apposite to notice paragraph 10 of the judgment (of SCC).

> …Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. **The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc.** The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petitioner under Article 226 of the Constitution cannot be denied altogether, Courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution.

In a recent judgment in **Government of Andhra Pradesh v. Sri Rama Engineering Constructions** a Division Bench of this Court after considering the case law elaborately, summarized the law in this regard and in paragraph 20 of the judgment held that though there is no bar to entertain a Writ Petition even in contractual matters, normally the parties will be relegated to ordinary remedy of civil suit when highly disputed questions of fact would arise requiring oral evidence which is not on record and that exercise of jurisdiction thus depends upon facts and circumstances of each case, the nature of the dispute or difference, the quantum of evidence to be recorded etc.

In the case on hand, there is a dispute as to whether clause 3 or clause 4 of LOI applies. That itself is a question of fact requiring evidence, especially when petitioner's counsel disputes the quantities and figures mentioned in the impugned letter. Therefore, this Court is not inclined to entertain the Writ Petition. Liberty is given to the petitioner to approach the Civil Court for appropriate relief.

Accordingly, the Writ Petition is dismissed. The interim order shall stand vacated. There shall be no order as to costs.

_____

(V.V.S.RAO, J)

16.8.2005

bnr